IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 83-589

HOPI INDIAN TRIBE, et. al.,

Petitioners,

v.

JOHN R. BLOCK, et. al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE AMICI CURIAE AND AMICI CURIAE MEMORANDUM

**ALL INDIAN PUEBLO COUNCIL,
AMERICAN INDIAN LAW CENTER,
THE CHRISTIC INSTITUTE,
INDIAN PUEBLO LEGAL SERVICES, INC.
NATIONAL INDIAN YOUTH COUNCIL**

IN SUPPORT OF REVERSAL

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MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE

The National Indian Youth Council, Inc. (NIYC) and other amici hereby respectfully move pursuant to Rules 36.1 and 42.(3) of its Rules of Practice, for leave to file the attached brief as amici curiae in support of petitioners effort to seek review of First Amendment questions concerning the extent to which

the Constitution protects Indian religious freedom.

This motion and the attached brief are timely filed within the time allowed for filing of respondents' brief on the petition for certiorari.

Amicus curiae are Indian nations, Indian Rights organizations, churches and civil liberties organizations all of which have been involved in issues of religious freedom.

The proposed brief of amici addresses issues not fully developed by the parties. Amici believes that the court below erred in its First Amendment free exercise analysis. This error was based, in part, on the unique nature of Indian free execise claims when compared with Judeo-Christian free exercise claims and viewed from the history of federal Indian policy.

Amici have requested the consent of the parties to appear. The petitioners have granted such consent, but the respondents have not responded to amici request and therefore amici assumes that respondents have declined. For the above reasons, amici respectfully move this Court for leave to file the attached brief amici curiae in support of granting writ of certiorari.

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All Indian Pueblo Council

American Indian Law Center

Christic Institute

Indian Pueblo Legal Service

National Indian Youth Council

QUESTIONS PRESENTED

I. May the National Park Services discriminate between Judeo-Christian religions and traditional Indian religions by licensing and encouraging the use of Park Service areas by the first and refusing to make reasonable accommodations for use by the second?

II. Must Indian religions adherents show that the practice of their religion will be absolutely prevented before they are afford the protections of the First Amendment?

III. Will accommodations of Indian religious practices on federal lands create unmanageable problems for federal land managers?

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BRIEF AMICUS CURIAE OF
NATIONAL INDIAN YOUTH COUNCIL, et. al.

The organizations joined herein file this brief Amicus Curiae in support of the petition of Hopi Indian Tribe, et. al. pursuant to Rule 36.1 of the Rules of the Supreme Court.

STATEMENTS OF INTEREST OF AMICI CURIAE

All Indian Pueblo Council

The All Indian Pueblo Council (AIPC)

represents nineteen Indian Pueblos in New Mexico. AIPC has participated, on behalf of the Pueblos, in challenges to specific resource development when the proposed development impaired access by Pueblo Indians to traditional religious sites.

American Indian Law Center

The American Indian Law Center is a non-profit Indian rights organization with expertise in Tribal government and the management of federal, state and tribal jurisdictional relationships. The Center was the principal author of the American Indian Religious Freedom Act Report, cited herein, and relied on by amici in support of the petition for certiorari.

The Christic Institute

The Christic Institute is a public interest law firm and policy center

established in 1980 to bring spiritual and religious values to bear, in both traditional and contemporary ways, on public consciousness and policy making. The Institute is particularly sensitive to erosion of the constitutional guarantee of or the free exercise of religion.

Indian Pueblo Legal Services, Inc.

Indian Pueblo Legal Services (IPLS) is a legal services corporation grantee that serves the nineteen Indian Pueblos in New Mexico. IPLS has represented individual Indians in numerous First Amendment cases and supports the development of legal standards that address the unique nature of Indian First Amendment claims.

National Indian Youth Council

The National Indian Youth Council, Inc. (NIYC) is a national non-profit Indian organization which was formed

in Gallup, New Mexico in 1961. NIYC has engaged in a number of activities to preserve and enrich traditional Indian communities and protect Indian traditions on and off the reservation. Toward that end NIYC has been extensively involved in litigation which has sought to insure the survival of American Indian religions, see Sequoyah v. T.V.A., 620 F.2d 1159 (6th Cir. 1980), cert. denied, 449 U.S. 953 (1981) and Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) cert. denied, 452 U.S. 954 (1981). NIYC participated in this case as an amicus curiae in the Court of Appeals and hopes to inform the Court as to specific issues not addressed by the parties in this matter.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS PERMITS THE NATIONAL PARK SERVICE'S CONTINUED DISCRIMINATION IN FAVOR

OF NON-INDIAN RELIGIONS, AND AGAINST TRADITIONAL INDIAN RELIGIONS. THIS CONSTITUTES AN INVIDIOUS RELIGIOUS, RACIAL, AND CULTURAL DISCRIMINATION PROHIBITED BY THE FIRST AND FIFTH AMENDMENTS.

The National Park Service discriminates among religions, encouraging the majority Christian faiths to operate religious facilities on federal lands, but prohibiting the adherents of minority traditional Indian religions from practicing their religions on those same lands. While the National Parks Service has put aside over a hundred separate locations for Christian worship, it now claims that the governmental need for more skiing areas in Arizona makes it impossible to accommodate the need for religious use of the most holy Navajo and Hopi religious sites. Whether characterized as a violation of the free exercise clause of the First Amendment or a violation of the equal

protection principles incorporated in the due process clause of the Fifth Amendment, see Bolling v. Sharpe, 347 U.S. 497 (1954), this federal action constitutes an invidious discrimination on the basis of religion, race and culture.

There is no doubt that the First and Fifth Amendments protect Indians as a class. See Morton v. Mancari, 417 U.S. 535 (1974). The United States has never argued that the beliefs of the petitioners are other than sincerely held religious beliefs, and neither the United States nor any Court below has suggested that the Navajo or Hopi traditional religious practices are "so bizarre, or so non-religious in motivation, as not to be entitled to protection under the Free Exercise Clause" Thomas v. Review Board of the Indiana Employment Security

Division, 450 U.S. 707, 715 (1981). Thus, these religious beliefs are entitled to the full measure of protection afforded to Judec-Christian religions.

Jews and Christians practice their religions in this country without dependence on any particular physical location, and thus, we have come to think of religion as independent of the use of special religious sites. In part, this is because the sites holy to most Jews and Christians are in distant locations. The federal government has not only recognized the significance of the foreign Christian religious sites but it expends federal money to duplicate one of them - the city of Jerusalem - in a federal wildlife refuge. The Department of Agriculture refuses to recognize the Navajo and Hopi religious

interests in land in the instant case, however, the Department of Interior sanctions the operation of "Holy City" in the Wichita Mountain Wildlife Refuge. See Swomley v. Watt, 526 F. Supp. 1271, 1272 (D.D.C. 1981) (dismissed for lack of standing).

Traditional Indian religious sites are located within this country. For well known historical and political reasons, virtually all of those sites are located on land controlled by the federal government. Thus, the federal government's insensitivity to Indian religious beliefs has an especially high First Amendment cost. There is no alternative place of worship for many Indian religious practices, and the federal government's insensitivity to these needs will necessarily lead

to the destruction of the Indian religions.[1]

This fear is not a hypothetical one, and a number of recent lower federal court decisions may have hastened the demise of Indian religions. For example, the Cherokee in Sequoyah v. T.V.A., 620 F.2d 1159 (6th Cir. 1981), cert. denied, 449 U.S. 953 (1980), the Navajo in Badoni v. Higginson, 638 F. 2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981), the Cheyenne and Lakota in Fools Crow v. Gullet, 541 F. Supp.

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1. No Christian or Jew could fail to be offended by Jordanian government's decision to build a major tourist facility - the Intercontinential Hotel - on the Mount of Olives. The fact that the most ancient Jewish headstones were used in construction made the government's action particularly offensive. The government's proposed ski area provides exactly the same offense to Navajo and Hopi religious adherents. The First Amendment ought to prohibit in this nation the kind of governmental conduct that was so destructive in Jerusalem.

785 (D.S.D. 1982), (8th Cir. May 10, 1983, No. 82-1852, Cert. petition filed October, 1983), the Inupiat in Inupiat Community of Arctic Slope v. U.S., 548 F. Supp. 182 (D. Alaska 1982), and in the instant case seeking review Wilson v. Block, 708 F.2d. 735 (1983), all lost in their efforts to protect religious sites under federal ownership. The only decision finding that the actions of the federal public land manager were proscribed by the free exercise clause is Northwest Indian Cemetery Protective Association v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983), appeal pending, (9th Cir. No. 83-2225). In all of the above cases, as in the instant case, the public lands were under Indian control prior to their expropriation by the federal government. The current public uses of these federal public lands is

inconsistent with the constitutionally protected Indian religion practices and beliefs.

The government does not prohibit all religious activities on federal public land. In contrast to its insensitivity to traditional Indian religious beliefs, the government sanctions and even encourages religious worship on public lands by practitioners of more established Judeo-Christian denominations. In addition to the National Wildlife Refuge's "Holy City", the National Park Service currently manages 121 churches in its National Parks. Sectarian religious services are regularly held at privately owned churches designated as national historical sites and operated by the National Park Service, and the National Park Service also owns and operates churches at many National Parks.

The federal government effectively prohibits Indian religious practices and beliefs on federal land and promotes the practice and beliefs of more established religions. Any government program that has the effect of discriminating among religious faiths "must be invalidated unless it is justified by a compelling governmental interest, cf. Widmar v. Vincent, 454 U.S. 263, 269-270 (1980), and unless it is closely fitted to further that interest, Murdock v. Pennsylvania, 319 U.S. 105, 116-117 (1943)." Larson v. Valente, 456 U.S. 228, 247, (1982). No party has even suggested that the operation of a ski area could meet this test.

The federal government should not be permitted to discriminate among religious faiths on federal public lands.

To urge and facilitate the development of Judeo-Christian religions on national public lands while at the same time destroying Indian religions on the same lands constitutes invidious racial, religious, and cultural discrimination by the federal government. The government can show no compelling governmental interest to justify this discrimination.

II. PRACTITIONERS OF INDIAN RELIGIONS NEED NOT SHOW A GREATER BURDEN ON THEIR RELIGIOUS PRACTICES THAN MUST PRACTITIONERS OF JUDEO-CHRISTIAN RELIGIONS TO PARTAKE OF THE PROTECTIONS OF THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

The Court of Appeals failed to apply this Court's Free Exercise analysis to the Hopi and Navajo claim that the actions of the forest service burden their Free Exercise of religion. As the Court stated in its most recent term:

> "This Court has long held the Free Exercise Clause of the First Amendment

an absolute prohibition against governmental regulations of religious beliefs, Wisconsin v. Yoder, 406 U.S. 205, 219 (1972); Sherbert v. Verner, 374 U.S. 398, 402 (1963); Cantwell v. Connecticut, 310 U.S. 269, 303 (1940). As interpreted by this Court, moveover, the Free Exercise Clause provides substantial protection for lawful conduct grounded in religious beliefs, see Wisconsin v. Yoder, supra, 406 U.S., at 220; Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981); Sherbert v. Verner, supra 374, U.S., at 402-403. However, "(n)ot all burdens on religion are unconstitutional. . . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." United States v. Lee, 455 U.S. 252, 257-258 (1982) (citations omitted). See, e.g., McDaniel v. Paty, 435 U.S. 618, 628 and N.8 (1978); Wisconsin v. Yoder, supra, 406 U.S., at 215; Gallette v. United States, 401, U.S. 437 (1971)." Bob Jones University v. U.S., 51 U.S.L.W. 4593, 4601__U.S.__(1983).

The Courts below required the Indian religious adherents to show that the practice of their religions would be absolutely prevented (not burdened) by the development of the ski resort before

these Courts would even apply the First Amendment balancing test. at 744. In addition, the Court of Appeals held that the Indians must show that the proposed government action "penalized Plaintiffs for their beliefs." at 742. (emphasis added).

The lower Courts did not properly apply this Court's First Amendment analysis. The tests applied in the lower Courts imposes a greater burden of proof on adherents of Indian religions to show that their free exercise is burdened than is imposed on any other religion making a similar claim.

III A HOLDING IN FAVOR OF PETITIONERS IN THIS CASE WOULD NOT CREATE A VETO POWER OVER FEDERAL LAND USE BY RELIGIOUS ADHERENTS.

The history of federal Indian policy in the United States has been characterized by dramatic shifts in perspective. At

one time the official federal policy of the United States was to oppress and assimilate Indians into the mainstream of society. A central part of this policy was the suppression of Indian religions. It is well documented that in the nineteenth century the United States government allocated various Indian tribes to specific religious sects to indoctrinate the tribes into the mainstream of non-Indian society. In accordance with this federal policy, anything associated with Indian religions was ruthlessly supressed. See generally, F. Prucha, American Indian Policy Crisis, (Norman: University of Oklahoma Press, 1976).

Since federal land managers get their policy guidance from the general temper of the times, the federal land managers had, as a matter of course, prohibited Indian access to sacred sites.

The policy of suppression has been thoroughly discredited and a new era of Indian administration was instituted by John Collier in the 1930's and despite the ups and downs of the last fifty years of federal Indian policy, no one would seriously contend that the policies of religious suppression should be reinstituted. In accordance with the renewed policy of supporting Indian cultures, the American Indian Religious Freedom Act, Public Law 95-341, 96 Stat. 469 (1978) 42 U.S.C. 1996, was passed to remedy and alleviate past policy practices of the suppression of Indian religions.

The Act became effective August 11, 1978. Section 1 of the Act reads as follows.

> "On and after August 11, 1978 it shall be a policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express,

> and exercise the traditional religions of the American Indian, Eskimos, Aluet, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

Under the authority of Section 2 of the Act a Task Force prepared a report documenting areas of conflict and procedural changes necessary to effectuate the policies of the Act. The American Indian Religious Freedom Act Report, (U.S. Department of Interior: 1979), identified problems of Indian religious access in twenty states that affected over forty tribes. The types of access problems that would be presented to federal agencies and to Federal Courts are certainly manageable and it is unlikely that a new host of access problems will arise in the future. Implied in the Sequoyah, Badoni, Fools Crow, Inupiat, and Wilson holdings is that Indian religious adherents would have a veto

power to all federal land use. The implied argument that a dying religion of a tiny minority seeking a permanent open-end religious easement on all federal property that would effectively control federal use and enjoyment of public lands is unwarranted. After centuries of official federal policy designed to destroy Indian cultures and religions, Indian societies, in accord with current federal policy, are renewing their efforts to sustain themselves. The Task Force Report has identified all potential religious access claims and no further claims are likely to arise. Federal land managers already have at their convenience an existing document, the American Indian Religious Freedom Act Report, in which to identify all Indian religions access claims and make reasonable accommodations for Indian religious interests.

CONCLUSION

The Petition for Writ of Certiorari demonstrates that the Court of Appeals made a clear error on an issue of national significance. Thus, it should be granted.

Respectfully submitted,

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